SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 22

CITY OF OAKLAND, ACTING BY AND THROUGH ITS BOARD OF PORT COMMISSIONERS,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND UNITED STATES MARITIME COMMISSION,

Appellees.

REPLY BRIEF OF APPELLANT, CITY OF OAKLAND.

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Introduction.

It is difficult to follow the Solicitor-General in his reading of the authorities.

For example, on pages 43-44 of his brief, in discussing free time allowances, he says:

> "The Commission's condemnation on these grounds of the practice of granting excessive free time allowances, as unduly preferential and unreasonable, finds ample support in the authorities. See pp. 62-68 *infra*; cf. *Turner Lumber Co.* v. *C. M. & St. P. Ry.*, 271 U. S. 259, 262."

That case can be read over and over and no support will be found in it for the proposition to which it is cited.

In that case, the carrier *on its own motion* raised the demurrage rates on certain cars loaded with lumber (but not those used for other commodities). On suit of a shipper, the court upheld the rates, saying:

> "* * * Neither the Constitution nor the rule of reason requires that either freight or demurrage charges or the reconsignment privilege shall be the same for all commodities."

It was not a case of any commission, or any court, condemning any practice as preferential or unreasonable, or discriminatory. It was precisely the opposite. A distinction between services, initiated by the carrier, was upheld.

How that case, or any language in it, supports the Solicitor-General, cannot be conceived. Why he cited it for consideration cannot be conceived.

It is not an isolated example.

In the footnote on page 51 of his brief, the Solicitor-General says:

> "* * * It is clear, however, that the power to prevent discriminatory rates (Secs. 16 and 17) necessarily involves the power to fix minimum rates in cases, such as those of inordinately low 'missionary rates' (See *Minn. & St. L. R. Co.* v. *Minnesota*, 186 U. S. 257, 267; *So. Pac. Co.* v. *I. C. C.*, 219 U. S. 433, 439), where the discrimination can most effectively be covered by fixing minimum rates."

Neither of the cases cited even contain any language supporting the thesis advanced.

Neither do the facts of either of them lend any reinforcement.

The *Southern Pacific* case, to take the least relevant first, merely held that the Interstate Commerce Commission could not compel a railroad to maintain a low lumber rate it had initiated to meet water competition from the Willamette

valley in Oregon to the San Francisco bay. If anything, this decision upheld those so-called "missionary rates".

But the *Minneapolis & St. Louis Railroad* case, also cited, not only does not support the Solicitor-General's position, but is a direct authority upholding what this appellant contends, namely, that there is no discrimination between users of a public utility if each pays at least "out-of-pocket" costs. The opinion pronounces, at page 267:

> "Notwithstanding the evidence of the defendant that, if the rates upon *all* merchandise were fixed at the amount imposed by the Commission upon coal in carload lots, the road would not pay its operating expenses, it may well be that the existing rates on other merchandise, which are not disturbed by the Commission, may be sufficient to earn a large profit to the company, though it may earn little or nothing upon coal in carload lots * * * It often happens that, to meet competition from roads at particular points, the companies themselves fix a disproportionately low rate upon certain classes of freight consigned to these points. The right to permit this to be done is expressly reserved to the Interstate Commerce Commission by section 4 of the act * * * and has repeatedly been sanctioned by decisions of this court * * *"

We do not mean to suggest that all the decisions cited in the brief of the Solicitor-General can be turned around that way. With nine-tenths of them, those supporting the general propositions, we agree. We merely ask the court to read those we controvert, and not take our word, or that of the Government, for the meaning of any case in dispute.

In the introduction to the argument in our opening brief, we called attention to the grave due process of law question that could be involved in this proceeding if the customary degree of finality were accorded the administrative decision here in question.

We pointed out that the Maritime Commission acted not only as accuser, prosecutor and judge, but that it also was the witness—the expert witness—upon which it predicated its findings.

This is not disputed in the brief of the Solicitor-General. It is conceded.

For instance, on page 8 of the Government's brief, Mr. Differding is called "the principal witness on these matters". On page 66 he is called the "chief witness". See also pages 71 and 75, *inter alia*.

With all our pronouncements of administrative expertness set aside for the moment, is this the process of law guaranteed, if coupled with it is found the doctrine of finality of administrative decision? That is what the Government contends.

On pages 40 and 41 of the brief the Solicitor-General urges the doctrine of finality. If that doctrine is to be accepted, I reopen my point of due process of law, because unless there is real and adequate judicial review in this case, the procedure being so unfair, there is no safeguard for a citizen, or a city, or a state.

To bring the matter into relief, let us consider the following:

The Maritime Commission admitted, and the Solicitor-General concedes, that the former has no power to regulate the rates, as such, of any wharfinger.

It is contended that it has the power to remove discriminations, under sections 16 and 17 of the Shipping Act. Suppose we concede that, *arguendo*. It proceeds, that if the users of wharf storage do not pay their full way (and we leave out of consideration here the out-of-pocket theory) that thereby the users of other services of the wharfinger are forced to assume the burden; that thereby a discrimination is born.

That is the essence of the argument. There is a discrimination because one customer must pay for what another customer uses.

But suppose that burden is not assumed. Suppose, instead, that the wharfinger assumes it. Is there any burden?

There is no requirement of the Constitution, or of the Shipping Act, that the City of Oakland make a profit in its governmental capacity of operating wharves. (*Nashville* v. *Ray*, 19 Wall. 468.) As a matter of fact, all its wharfinger operations are carried on at a loss. See Government's brief, p. 16, n. 14: "* * * The inclusion of the interest paid, other than that assigned to the city's municipal airport, revealed a loss of $95,859.33 on the terminal operations." On page 68 of that brief it is shown that Encinal, Howard, Oakland and certain San Francisco piers handled respectively, in one year, approximately 33,000, 29,500, 18,000 and 5,500 tons respectively of wharf storage cargo on an average over a 12-month period. The percentage of stored cargo to all cargo moving over the wharves was, respectively, 5.89%, 7.62%, 3.07% and 2.54%.

Turning back to page 16 of the brief, we find that for the same year, Encinal's and Howard's total revenues from wharf storage and wharf demurrage were roughly $24,500 and $31,500 respectively.

Each of those terminals handled more storage cargo than did Oakland. The increase recommended by Mr. Differding and the Commission is about 33⅓% plus an estimated 10% increase in wharf storage revenues because of the reduction of free time. (R. p. 716).

So, a third of the Howard figure, the highest, plus 10%, when added to an assumed equivalent revenue, doesn't come close to the sum of $95,000.00 which it is asserted the City of Oakland loses from its total port operations in a given year. Isn't the Commission hoist on its own petard?

The point is, could the City reduce its other charges if wharf storage rates are increased. If it couldn't how can it be said that the maintenance of the existing storage rates casts a burden on the users of other services. The city has assumed the burden.

If so, there is no discrimination.

That is to say, one can throw back in the teeth of the Commission its own statements, those of its counsel, to belie what its expert witness testified to.

Are we then to be met with the proposition that if there is any evidence to support it, the administrative decision is final?

And if that proposition is advanced, is that due process of law?

Free Time.

We said in our opening brief (p. 95 *et seq.*) that the matter of free time allowance was of no particular concern to this appellant.

We opposed the Commission's order with respect to it because we believed it has no right to order us in any event, and more particularly, because, in the lower court, it hung its hat on free time as a reason for sustaining its order as to wharf storage.

The brief of the Solicitor-General follows the same pattern in this respect. (See pages 39-46, Appellee's brief.)

It is no answer to say (as on p. 44 thereof) that "nearly all of the witnesses who testified on this subject favored stricter free time allowances than those now in effect." We believe Port of Oakland witnesses so testified, and if they didn't, we concede we adhere to that proposition. But we did not concede that the existing free time allowance was discriminatory. We did not concede the Maritime Commission had any jurisdiction to *order* us to change it.

We should remember always (if we concede, as we shall for the remainder of this brief, Congressional authority and intention to regulate this appellant), that the question is one only of discrimination.

There is no intimation in the record that the existing free time allowance is not open to all. It is published in the tariff. How, then, can it be discriminatory?

There is one feature of our existing free-time rules which probably is objectionable from a public utility standpoint. This is the provision permitting the Port Manager, in his discretion, to extend free time when the vessel is delayed. All our competitors have a similar saving clause and the purpose is this: In these days of steamships, about the only thing that delays a vessel is a labor dispute. That dispute may or may not concern the terminal operator, but he is an intermediary between the shipper or consignee and the vessel. In a sense, he represents the vessel on land. He gets business only if goods move by water. He may interchange between water and rail, but if the movement is all rail, he does not share. His pecuniary interest, therefore, is to protect water movement.

Consequently the wharfinger has assumed certain risks attendant on water shipments, at least on the Pacific Coast, where waterfront strikes have been too common for the last decade. Out there, if a wharf is picketed, no truck or rail car will serve it. The result is that, in extreme cases, cargo has lain on the wharf for many months. The shipper or consignee, who has his money tied up in it, is helpless. The compensating factor is that the labor costs of a terminal during a strike are practically nil. Doesn't it therefore seem reasonable that the wharfinger should extend the free-time period, so the shipper or consignee should not have to pay for involuntary storage?

I concede that the Port of Oakland tariff as so written with respect to free time lends itself to discrimination. It

can be remedied by eliminating the discretion of the Port Manager and setting up certain distinct rules governing extensions of free time.

But the fact that there is a discretion (which may be discriminatory in practice, and this we deny) does not warrant a finding that the whole free time set-up is discriminatory.

That is the basis upon which the Maritime Commission's order rests.

That is the reason I said in my opening brief that the Commission was burning down the barn to get the rat.

The fact that the element of discretion may be objectionable from the concept of public utility law does not warrant the destruction of the rule to which it is the exception.

And this thought should be borne in mind throughout the consideration of this cause, since the Government bases its order concerning free time on this exception, and then, in the major issue of the case, holds that the rates of wharf storage must be limited in order to make effectual its order regarding free time.

As a matter of fact, the Commission has prescribed a maximum free time which is less than that granted by Los Angeles and the Puget Sound and Columbia River ports, which are the only Pacific Coast competitors of the San Francisco bay.

See Record, p. 25 (the Report of the Commission) where it is said (and the Northwest Marine Terminal Association means the ports of the Columbia and Puget Sound):

> "Members of Northwest Marine Terminal Association grant no extensions of free time. They, as well as terminals at Los Angeles, provide 10 days' free time in intercoastal (outbound) and foreign and offshore trades. In other trades these terminals, like San

Francisco, grant 5 days except that at Seattle and Tacoma the time is 10 days on coastwise outbound * * *."

The order of the Maritime Commission cuts most of those allowances in half (R., p. 25) as applied to these appellants. This it does on the supposition that our existing allowances are discriminatory.

If the entire Pacific Coast is essentially uniform, how can the rates of one port be labelled in that fashion?

If ever an administrative order were capricious, we submit this one is. According to the Government's own brief, that which obtains elsewhere is evidence of reasonableness (Br., p. 45).

Appellant's Wharf Storage Rates Are Not Discriminatory.

It is manifest from the brief of the Solicitor General that there is no contention that the Maritime Commission has any concern over the reasonableness of wharf storage rates maintained by this appellant. That is to say, they may or may not be reasonable, and by that, in the present proceedings, is meant too low.

The only thing the Commission can be interested in, what its order is predicated upon, is the matter of discrimination. To find a discrimination the order finds the rates are not compensatory, that a loss is incurred in rendering the service which must be made up by the users of other services of appellant. * *.

Appellant has denied this throughout the proceeding and has countered that the record does not disclose any loss resulting from the present rates; that the record shows that they recoup fully any out-of-pocket costs laid out in performing the service; that if this is so, there can be no burden cast on others.

The Government disputes both the law and the facts above summarized; but the principle is sound and the record sustains its applicability. (And, by way of passing, it should be remembered that the record must affirmatively show the alleged discrimination. The Commission cannot shift the burden of proof to this appellant.)

It might be well to outline what a wharfinger does in connection with wharf storage, to show what actually happens to cargo availing itself of it, and to compare it to ordinary warehousing.

Wharf storage may occur prior or subsequent to a water movement. The operation is the same in both instances, except for the matter of order.

To bring it into clearer relief, let us take first a shipment on which no storage occurs.

A vessel ties up at the wharf. The longshoremen, who are not port employees but are paid by the vessel, unload 100 tons of tin plate. The goods are checked in by port employees and the longshoremen place them at a point of rest on the wharf designated by the port. During the free time period, the consignee accepts delivery, either by motor truck or rail, either of which he pays for. The port doesn't touch the goods and its only direct labor costs are checking in on receipt, checking out on delivery, and the incidental paper work in billing.

The terminal's revenues in that case are a charge against the vessel, dockage, (based on the size of the ship), for the privilege of berthing; another charge against the vessel, called the service charge (based on the amount of cargo discharged) for the port's services in checking the cargo in and out, securing lines, delivering to the consignee, and the incidental paper work; and lastly, wharfage or tolls, assessed against the cargo for the privilege of transiting the wharf.

Let us now assume an identical movement, except to add the element of storage.

The vessel ties up at the wharf. The longshoremen, as in the previous case, unload 100 tons of tin plate. The goods are checked in by port employees and are placed at rest on the wharf at a point designated by the port. Instead of moving out during free time, the cargo remains on the wharf, in that identical spot, for one day beyond free time, or 10 or 30 days beyond it. When the consignee wishes to take delivery he does so, and the goods are checked out by port employees.

The only additional work the port does is in billing the storage charges accruing after free time has expired. That is the only direct, out-of-pocket expense it incurs.

The Solicitor-General's brief exhibits some surprise (pp. 46-47) that the "evidence showed that at Stockton and Oakland wharf demurrage rates were lower than public warehouse storage rates."

They should be. There is less handling of the goods, and handling is expensive.

Take a movement where goods are moved into a warehouse. If the goods come off a ship, every step above outlined occurs, and from then on, all the additional things that follow.

We have the goods on a motor truck or rail car, whether they come direct from the factory, or farm, or from a wharf after a water movement.

The tailgate of the truck contacts the warehouse platform, or the rail car pulls up to the siding. From there on the warehouse goes to work. *Its* employees move the goods into the place of rest, and when they are delivered after warehousing ends, *the warehouse employees* move them back to the platform. Warehouse employees check, receive and deliver (for this last item, it will be noted

from above, the steamship pays the port for the identical service).

Consequently, the warehouse performs the manual labor of moving the goods which the wharfinger does not (and for this the warehouse exacts what is known variously as a "handling" charge, or an "in and out" charge), and the clerical work in connection with it for which it must be paid (and for which the wharfinger already has been paid in the comparable wharf storage).

Consequently, it is idle to say that the rates of this appellant for wharf storage are lower than public warehouse rates. It would be unconscionable if it were not so. We don't handle the goods and we already have been paid for other services for which the warehouseman, very rightly, must charge.

This appellant has been rather proud of its wharf storage set-up, eliminating, as it does, the extra handling required in ordinary warehousing, and thus making possible a more economic distribution. The order of the Maritime Commission is not intended to foster it.

The last example, that of the warehouse movement, throws into relief the fallacy of the order.

The essence of that order with regard to storage is three-fold. It prescribes, (1st), a 5¢ per ton per day *penalty* demurrage charge for the first 5 days after free time "intended to compel the removal of the cargo off the dock or into storage" (Report of the Commissin, R. p. 35), (2nd) a "handling charge" of 25¢ to 40¢ per ton on the heaviest moving commodities, plus (3rd) a period storage rate (based on 15-day periods).

This appellant objects to all three elements.

Its transit sheds are of modern design, built with the idea of accommodating storage. The Commission grudgingly admits this. (See R. p. 37).

Secondly, a "handling charge" is a theft from the shipper unless the wharfinger does handle the goods.

Thirdly, this appellant always has insisted on a daily basis, instead of a period basis, of storage, because that seems equitable.

For example, under the Commission's order, leaving out penalty demurrage and the handling charge, a shipper of canned goods, which is the heaviest moving commodity at California ports, would pay 12½¢ per ton for a 15-day period (the existing rate is 1¼¢ per day).

Add to that a penalty rate of 5¢ per day and it is seen that the rate for 5 days is 25¢, compared to the existing rate of 12.5¢. On the 6th day the charge has been 25¢ plus the handling charge of 25¢, plus the 12.5¢ charge for the period basis of storage. That means, on the 6th day, the cargo will be assessed 62½¢ which is certainly enough to drive the cargo off the wharves and into the warehouses.

Our competitors maintain warehouses on the east side of the bay.

The Solicitor General in discussing the contention that the power to fix rates is prohibited by the structure of Sections 16, 17 and 18, states that in the footnote on page 51 "If carried to its logical conclusion this argument, which is a sort of *expressio unius* argument, would mean that no power was conferred to fix the minimum rates of carriers because Section 18 is specific as to the power to fix minimum rates."

That is precisely what appellant contends and authorities bear it out. The Solicitor-General keeps alluding to the fact that the Shipping Act, 1916, was modelled upon the Interstate Commerce Act; but it was not until 1920 (with the enactment of the Transportation Act of 1920) that the Interstate Commerce Commission had any power over minimum rates.

We pointed that out in our opening brief on pages 85-86, where we quoted Stone, J., dissenting in *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, at 668, where he stated:

> "* * * It is true that in cases arising before the Transportation Act, 1920, by which power was given to the Commission to fix the minimum rate, it could not remove a discrimination by prescribing a minimum rate to one of the competing localities. * * *"

We also note the opinion of Brandeis, Jr., in *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 565.

> "Congress, however, steadfastly withheld from the Commission power to prevent by direct action the charging of unreasonably low rates. The common law did not recognize that the rate of a common carrier might be so low as to constitute a wrong; and the Congress has declined to declare such a rule * * *."

Consequently, if Congress had not until 1920 given the Interstate Commerce Commission power to fix minimum rates, there is no reason for alarm that it did not include such a power when the Shipping Act was made the law four years earlier. All the more there is no reason to read into the Shipping Act the right to fix such a rate.

Nevertheless that is precisely what the Commission is trying to accomplish in this case. It sets up very definite rates below which this appellant may not carry on its business.

We pointed out in our opening brief at page 66 *et seq.* that it was not until the enactment of the Act of June 23, 1938 (52 Stat. 964) that Congress gave the Maritime Commission any power in connection with minimum rates and that this statute, which took the form of an amendment to the Shipping Act, 1916, does not mention the

phrase "other person(s)", which is the only phrase by which it can be contended that this appellant is subject to any of the provisions of the Shipping Act.

It is going far afield, as the Solicitor-General does in the note on page 52 of his brief, to contend that because the Act of 1938 also mentions a maximum rate that the argument of this appellant necessarily results in the construction that the Shipping Act prior to that time contained no safeguard against exorbitant charges.

The writer of this brief cannot feel that this contention is seriously advanced in view of the entire purpose of the Shipping Act to protect the patrons of water carriers and in view of the express language in Section 17 dealing with carriers in foreign commerce, and Section 18 dealing with carriers in Interstate Commerce, which authorized the Commission to establish reasonable rates as to such carriers. We have seen that similar language in the Interstate Commerce Act before the enactment of the Transportation Act, 1920, did not give the Commission any jurisdiction over minimum rates. It requires no citation of authority to assert that nevertheless that Commission did regulate the maxima which such rates might attain. The entire statutory set-up would have been fruitless unless this power had been granted and exercised.

In connection with the Government's contention that the fixing of a rate may be the regulation of a practice, and consequently to bolster its attempt to support the order of the Maritime Commission's assuming jurisdiction, it cites the case of *Swayne & Hoyt* v. *United States of America*, 300 U. S. 297. That case, your Court will recall, involved application of two sets of rates for identical services. If the shipper signed a contract he agreed to move all his water-borne goods from the Gulf Coast to the Pacific Coast on lines which were members of the Gulf

Pacific Coast Conference, he was given a certain rate. If, on the other hand, he refused to sign any such exclusive contract, he had to pay a higher rate for moving the same goods between the same points.

It should be noted that the Court was not concerned in that case with the level or reasonableness of either rate. The fact that there were two different rates for the same service meant that the proceeding was not a rate case at all but was one involving a practice, namely, the maintenance of rates varying for the same service.

The Court makes this clear when it says on page 303:

> "* * * A differential between appellant's rates on commodities transported under contract and the rates on the same commodities for non-contract shippers, was *prima facie* discriminatory since the two rates were charged for identical services and facilities and the narrow issue presented to the Secretary for decision was whether, in the conditions affecting the traffic involved, the discrimination was undue or unreasonable."

No such situation exists with the set of wharf storage rates or the free time rules presently applied by this appellant and which have been declared unlawful by the Maritime Commission in the order here under attack. They are open to all. But one set of rates, but one rule of free time applies to a given commodity in a given trade. The fact that this Court has held illegal the maintenance of two sets of rates for the rendering of identical service cannot in any way apply in the present instance; and it does not warrant the assumption that the maintenance of any particular set of rates is a practice.

The entire case simmers down to the question of whether or not the rates observed by this appellant are in fact discriminatory against any of the persons who use its facilities.

It is not surprising that the Solicitor-General relies most strongly upon the case of *Baltimore & Ohio R. R. Co. v. United States*, 305 U. S. 507.

We cited that case in our opening brief because, patently, the Maritime Commission had labored hard to bring this case within the scope of the rules therein laid down. The Commission found, for example, that the maintenance of the existing free time periods threw a burden upon the users of other services because many shippers could not avail themselves of a 10-day period within which to assemble goods for water movement, or within which to accept delivery after the water carrier had left them on the wharf. Likewise it found that our wharf storage rates were not compensatory (and by reference to the Edwards-Differding Formula, we find that means a share in the general administrative overhead, of direct costs, labor costs and profit), as a consequence of which a burden was thrown on the users of other services.

In an attempt to bolster this conclusion the Solicitor-General sets up an interesting table on page 68 of his brief showing that on an average, only 1.56% to 7.62% of the cargo handled by the various wharfingers who were respondents before the Commission goes into storage. While the statement is not definitely made, the inference is permitted that only those percentages of the users of the wharfinger facilities on San Francisco Bay have any need for wharf storage, or for the free time allowance presently prescribed.

The answer is obvious. The table referred to does not show who controlled the amount of cargo handled across the facilities and who controlled the amount of cargo that was stored on them. In other words, the fact is, and it is perfectly consistent with the table that practically every shipper who used the facilities at those terminals, from time to time stored a small portion of the goods he moved

across them. The same is likewise true of free time. In the ordinary case the shipper can deliver his goods to the wharf for loading aboard a ship within a shorter period than that which is now allowed. On the other hand, and this might be true of any shipper, there may be occasions beyond his control when he cannot assemble his entire shipment within any time shorter than the 10 days. The probabilities are that every patron of this appellant has availed himself of the full free time period on more than one occasion.

The contention of the Solicitor-General with respect to appellant's argument that no burden is cast upon any other person by the maintenance of a rate which meets out-of-pocket costs, proceeds along similar lines. It says that someone must pay us a profit if the users of wharf storage do not. It overlooks the fact that the very report which holds our wharf storage rates to be unlawful because too low, likewise recognizes that our operations as a whole, not only do not make any return on the investment, but do not reach a point sufficient to satisfy the carrying charges on the bonded indebtedness by some $95,000 per year.

At page 71 and other places in the brief, the Solicitor General implies that this appellant did not cooperate with the Commission during its investigation. For example, it is said that we did not supply our cost figures in accordance with the Edwards-Differding formula.

Lest there be any misapprehension in this regard, we desire to point to the closing statement of Mr. Scoll, who acted as Commission's Counsel during the hearings, to the effect that both the appellant in this case and that in Docket No. 20, had cooperated fully (R., p. 739).

But, more than that, we could not be expected to comply with a formula that we had protested throughout the pro

ceeding as being inept and not adaptable to our way of carrying on business.

By that we mean that we do not regard wharf storage as a penalty rate in any sense. The phrase "wharf demurrage" does not appear anywhere in the Oakland tariff. (See R. p. 1125). We desire to encourage wharf storage in normal times.

There are a number of benefits that accrue from having goods stored on the wharf in addition to what we have mentioned earlier in this brief—matters which are of direct benefit to the wharfinger and to the other users of his facilities. For example, prior to the war the Pacific Coast European Conference maintained an arbitrary against Eastbay ports by requiring that at least 150 tons of cargo be ready for outbound movement before a vessel operating in that trade would call. The principal commodities moving in that trade were canned and dried foods. If, for example, there were on storage, on the wharf, a certain amount of dried beans, they could be used to meet the 150 ton requirement, where possibly only 100 or 125 tons of canned goods were destined for the port to which the particular ship was to sail. Without that backlog the shipper of the canned goods would not have obtained the service.

Reverting once more to this question of burden on other users the Solicitor-General on pages 63 and 64 cites the case of *East Tennessee etc. Ry. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, and quotes therefrom the following:

> "* * * Taking a case where the carrier cannot meet the competitive rate to a given point without transporting the merchandise at less than the cost of transportation, and therefore without bringing about a deficiency, which would have to be met by increased charges on other business. Clearly, in such a case, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard

of the public interest, since a tendency towards unreasonable rates on other business would arise from the carriage of traffic at less than the cost of transportation to particular places * * *."

It is obvious that when the Court there uses the phrase "at less than the cost of transportation", it is not thinking of a compensatory rate in the sense it is used by the Maritime Commission in this case. But what it has in mind is a rate which does not meet the out-of-pocket cost in providing that transportation. Otherwise the case is out of line with all the authorities we have cited in our opening brief relating to the out-of-pocket theory.

It is interesting to note on page 73 of the Government's brief the statement from the Record that unallocated overhead items comprise more than 50% of all terminal costs. It is to be noted that the Commission has recommended an increase which it says will average perhaps 33⅓%. If these figures are true, it is apparent that our out-of-pocket cost is not more than 50% of the rates recommended by the Commission and substantially less than those presently in effect. This follows because unallocated overhead is constant and would go on whether or not the particular traffic were handled.

Conclusion.

It is respectfully submitted that this Court should not permit the overriding of local public policy unless the National interests are prejudiced in some way thereby.

There is nothing in this case that tends in any way to show that a burden has been cast upon interstate commerce; that this appellant has done anything to restrict its free flow. On the other hand the maintenance of rates as low as is possible would seem to encourage the movement of goods in interstate commerce rather than the opposite.

We have gone into a number of refinements in the briefs herein about the intent of Congress and the meaning of precise phrases. We have probably overlooked the rule that contemporaneous construction of a statute generally is the best. The undisputed fact is that for 24 years after the enactment of the Shipping Act, 1916, no one, including the Shipping Board, the Shipping Board Bureau and the Maritime Commission, the successive administrators of the Act, ever believed that the statute gave the power here assumed by the appellee Commission. It is respectfully submitted that that construction is the reasonable one and that the decree of the Lower Court should be reversed with instructions to grant the prayer of appellant's bill.

Respectfully submitted,

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December 4, 1943.